STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 16, 2009
v	No. 283306 Kent Circuit Court
SEAN DOUGLAS WIDNER, Defendant-Appellant.	LC No. 07-005405-FC

Before: Beckering, P.J., and Wilder and Davis, JJ.

PER CURIAM.

Following a jury trial, defendant Sean Douglas Widner was convicted of three counts of first-degree criminal sexual conduct with a person under the age of 13, MCL 750.520b(1)(a), and three counts of second-degree criminal sexual conduct with a person under the age of 13, MCL 750.520c(1)(a). Defendant was acquitted of one additional count of first-degree criminal sexual conduct, MCL 750.520b. He was sentenced to 40 to 60 years' imprisonment for each of the criminal sexual conduct convictions. He now appeals as of right. We affirm.

Defendant first alleges that the trial court abused its discretion when it denied defendant's repeated requests for substitute counsel. "The decision regarding substitution of counsel is within the sound discretion of the trial court and will not be upset on appeal absent showing of an abuse of that discretion." *People v Mack*, 190 Mich App 7, 14; 475 NW2d 830 (1991). "An abuse of discretion occurs when the result is so contrary to fact and logic that it demonstrates a perversity of will, defiance of judgment, or an exercise of passion or bias." *People v Akins*, 259 Mich App 545, 557; 675 NW2d 863 (2003). The United States and Michigan Constitutions guarantee a criminal defendant the right to the assistance of counsel. US Const, Am VI; Const 1963, art 1, § 20. However, defendant "is not entitled to have the attorney of his choice appointed simply by requesting that the attorney originally appointed be replaced." *Mack, supra* at 14. "A defendant is only entitled to a substitute of appointed counsel when discharge of the first attorney is for good cause and does not disrupt the judicial process." *People v O'Brien*, 89 Mich App 704, 708; 282 NW2d 190 (1979). The circumstances that would justify good cause rest on the individual facts in each case. *Id.* "Good cause exists where a legitimate difference of opinion develops between a defendant and his appointed counsel with regard to a fundamental trial tactic." *Mack, supra* at 14.

Defendant argues that the complete breakdown of the relationship between him and defense counsel justified the appointment of substitute counsel. We disagree. "[A] complete

breakdown of attorney-client privilege or disagreement over whether a particular line of defense should be pursued may justify appointing new counsel." *O'Brien, supra* at 108. But, "[a]bsent a bona fide irreconcilable dispute regarding, for instance, a substantial defense, disagreements regarding trial strategy do not constitute sufficient grounds for the appointment of successor counsel." *People v Krist*, 93 Mich App 425, 436-437; 287 NW2d 251 (1979). A review of the record reveals defense counsel and defendant had a difficult and strained relationship. Despite this strained relationship, defendant failed to prove there was good cause to appoint substitute counsel because there is no evidence in the record that a legitimate dispute over a fundamental trial tactic or substantial defense existed. *Mack, supra* at 14; *Krist, supra* 436-437. Defendant never once asserted what substantial defense would have been presented or what fundamental trial tactic would have been different if he were represented by substitute counsel. Even though defense counsel admitted before the second day of trial there was a complete breakdown of the relationship because of two grievances defendant filed against her, this breakdown occurred the day before and was a direct result of defendant's behavior in filing the grievances. This cannot form the basis for good cause to appoint substitute counsel. See *People v Cumbus*, 143 Mich App 115, 121; 371 NW2d 493 (1985); *People v Meyers*, 124 Mich App 148, 166-167; 335 NW2d 189 (1983) (This Court has held that a defendant may not deliberately cause a breakdown of the attorney-client relationship by not cooperating with his counsel and then assert there is good reason for appointing a new counsel.). Additionally, a review of the record revealed that defendant's general dissatisfaction with defense counsel stemmed more from his attempts to control the proceedings and his attempts at manipulation, rather than a legitimate difference opinion over a substantial defense or fundamental trial tactic. Based on these reasons, there is no support that the trial court's decision to deny defendant's requests for substitute counsel fell outside the principled range of outcomes. *Miller, supra* at 544; *People v Morgan*, 144 Mich App 399, 400-401; 375 NW2d 757 (1985).

Defendant also alleges that the fact that defense counsel failed to meet with defendant to discuss the defense strategy justified the appointment of substitute counsel. "Defendant may not leave it to this Court to search for a factual basis to sustain or reject his position." *People v Norman*, 184 Mich App 255, 260; 457 NW2d 136 (1990). Defendant provided no factual support, other than his own self-serving claims, to prove that defense counsel failed to meet with him. Further, the record establishes that both defense counsel and defendant stated, at a hearing a month before the trial began, that they had met at least once and had discussed the case at length the week before. Defendant's claim is meritless.

Third, defendant alleges that defense counsel failed to investigate defendant's recommended witnesses and thus, the trial court should have appointed substitute counsel. Defendant asserts if his witnesses were presented, their testimony would have established that the prosecution witnesses were lying. Disagreements that are fairly categorized as disputes over professional judgment and trial strategy are matters entrusted to the attorney and thus, are not grounds for the appointment of substitute counsel. *People v Traylor*, 245 Mich App 460, 463; 628 NW2d 120 (2001). A review of the record reveals that defense counsel investigated some potential witnesses but was hampered by incomplete information from defendant and limited funds. We note that, at trial, it was asserted that these witnesses would have testified to defendant's regular and unsupervised visits with the victim and his other daughter after the abuse was revealed. However, the prosecution conceded this point and both the victim and her mother testified at trial that these unsupervised visits occurred. Defendant does not explain how the

additional testimony would have been material to the proceedings or how the dispute over these potential witnesses constituted a dispute over a fundamental trial tactic rather than a dispute over defense counsel's professional judgment to not to waste resources pursing these witnesses and her trial strategy decisions with respect to the offered defense. *Traylor, supra* at 463. The trial court did not abuse its discretion when it denied defendant's requests for substitute counsel.

Defendant next contends the he was denied effective assistance of counsel. In general, a claim of denial of effective assistance of counsel is a mixed question of law and facts. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). This Court reviews issues of fact for clear error and reviews constitutional claims de novo. *Id.* Because a *Ginther*[1] hearing was not held and because the trial court made no factual findings, this Court's review is limited to errors apparent on the record. *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007).

To prevail on a claim of ineffective assistance of counsel, defendant must prove two components: 1) deficient performance, and 2) prejudice. *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Butler*, 193 Mich App 63, 67; 483 NW2d 430 (1992). To satisfy the first component, defendant must show that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland, supra* at 687. In other words, defense counsel's conduct must fall below an objective standard of reasonableness. *Id.* at 688. To prevail on this component, defendant "must overcome a strong presumption that counsel's performance constituted sound trial strategy." *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001). The second component requires the defendant to show "the existence of a reasonable probability that, but for the counsel's error, the result of the proceeding would have been different." *Id.* Defendant must satisfy both components to prevail. *Id.* at 599-600. "Because the defendant bears the burden of demonstrating both deficient performance and prejudice, the defendant necessarily bears the burden of establishing the factual predicate for his claim." *Id.* at 600.

First, defendant alleges defense counsel's failure to investigate and subpoena witnesses that defendant requested denied him effective assistance of counsel because the witnesses would have proved he was a good father and that he had regular and unsupervised visits with his own daughter in the years after the abuse of the victim was revealed. "Failure to make a reasonable investigation can constitute ineffective assistance of counsel. *People v McGhee*, 268 Mich App 600, 626; 709 NW2d 595 (2005). "A defendant is entitled to have his counsel prepare, investigate, and present all substantial defenses." *People v Robert Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990). "A substantial defense is one that might have made a difference in the outcome of the trial." *Id.* However, "[d]ecisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy." *People v Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999). Because defendant's daughter was not the victim in this case and because the victim and her mother both testified to these visits at trial, defendant has not demonstrated he was denied a substantial defense by the absence of the witnesses. See *People v Grant*, 470 Mich 477, 486-497; 684 NW2d 686 (2004). Additionally, we note that the Sixth Amendment does not require the counsel to do what is impossible. *United*

[1] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

States v Cronic, 466 US 648, 656 n 19; 104 S Ct 2039; 80 L Ed 2d 657 (1984). Given the age of the victim's allegations, the lack of full identifying and contact information of the potential witnesses, the limited budget of the Public Defender's Officer and defendant's suggestion that defense counsel canvass a neighborhood and/or make unsolicited telephone calls to locate the potential witnesses, it appears defendant expected defense counsel to do the impossible. *Id.* Defendant has failed to establish that he was denied effective assistance of counsel.

Second, defendant contends he was denied effective assistance of counsel because defense counsel was unprepared to cross-examine the victim and the victim's mother about the unsupervised visits between defendant, the victim and defendant's daughter. "When making a claim of defense counsel's unpreparedness, a defendant is required to show prejudice resulting from this alleged lack of preparation." *People v Caballero*, 184 Mich App 636, 640; 459 NW2d 80 (1990). Because the victim and the victim's mother both testified to the information defendant believes was helpful on cross-examination in response to defense counsel's questions, defendant has failed to prove defense counsel was unprepared or that he was prejudiced by the alleged unpreparedness. *Id*.

Defendant also claims he is entitled to a *Ginther* hearing. We disagree. The purpose of a *Ginther* hearing is to develop the factual record. *People v Ginther*, 390 Mich 436, 443-444; 212 NW2d 922 (1973). A defendant may be granted a *Ginther* hearing if the record has not been sufficiently developed and defendant can show evidence of a factual dispute, which might, if further developed, possibly be resolved in his favor. See *People v McMillan*, 213 Mich App 134, 141-142; 539 NW2d 553 (1995). Defendant has not shown the existence of any factual dispute that would require such a hearing. Additionally, defendant was not entitled to a court-appointed investigator to further investigate possible witnesses. A court appointed investigator is not "'automatically mandatory but rather depends upon the need as revealed by the facts and circumstances of each case.'' *People v Blackburn*, 135 Mich App 509, 520-521; 354 NW2d 807 (1984), quoting *Mason v Arizona*, 504 F2d 1345 (CA 9, 1974). The trial court has discretion to determine whether an indigent defendant has demonstrated that an investigator is necessary to ensure due process. *People v Johnson*, 245 Mich App 243, 260; 631 NW2d 1 (2001). There is nothing in the record to support defendant's contention of need and his assertions about what the witnesses would testify to was pure conjecture. *Id*. Consequently, the trial court did not abuse its discretion when it denied defendant's request for an investigator.

Defendant additionally claims that he was entitled to a presumption of prejudice pursuant to *Cronic*, *supra* at 659, because of defense counsel's absence during the pretrial period. "The presumption that counsel's assistance is essential requires us to conclude that a trial is unfair if the accused is denied counsel at a critical stage of his trial." *Cronic*, *supra* at 659. The right to counsel does not entitle a defendant with unlimited access to the attorney. *People v Mitchell*, 454 Mich 145, 152 n 9; 560 NW2d 600 (1997), vacated on other grounds 536 US 901; 122 S Ct 2354; 153 L Ed 2d 177 (2002). A review of the record indicates defense counsel met with defendant while he was in jail to discuss defendant's case and that defense counsel stated she was prepared for trial and acted appropriately during the trial. Thus, defendant has failed to establish the factual predicate that defense counsel was completely absent during a critical stage of defendant's trial.

Next, defendant argues that he was denied a fair trial because the trial court allowed the admission of similar-acts evidence in the form of testimony about an incident of sexual abuse

that allegedly occurred in Washington State. Defendant contends that this evidence was not admissible pursuant to either MRE 404(b) or MCL 768.27a. Because defendant failed to preserve this issue for appeal, we review the admission of the evidence for plain error that affected defendant's substantial rights, which requires defendant to show that the error affected the outcome of the lower court proceedings. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

MCL 768.27a provides, in pertinent part:

> [I]n a criminal case in which the defendant is accused of committing a listed offense against a minor, evidence that the defendant committed another listed offense against a minor is admissible and may be considered for its bearing on any manner to which it is relevant.

As referred to by MCL 768.27a, listed offenses include first-degree criminal sexual conduct, MCL 750.520b, and second-degree criminal sexual conduct, MCL 750.520c. MCL 28.722(e)(x). At trial, the victim, the victim's mother and James Widner, defendant's brother, all testified about an incident of sexual abuse that occurred in Washington State that culminated in the victim's mother first learning of the ongoing abuse by defendant of the victim, and defendant making admissions of guilt to the victim's mother and James. Engaging in sexual behavior with a child under the age of 13 is a listed offense. MCL 750.520b; MCL 750.520c. Defendant was also charged with listed offenses, MCL 750.520b(1)(a) and MCL 750.520c(1)(a). Because sexual abuse of the victim in Washington State is construed as a listed offense and because defendant was charged with a listed offense, the witnesses' testimony was admissible pursuant to MCL 768.27a.

Defendant also contends he was denied a fair trial because the testimony about the Washington State incident was unduly prejudicial. MCL 768.27a allows for this type of evidence to be admitted, and it "may be considered for its bearing on any manner to which it is relevant." However, even if the evidence is admissible pursuant to MCL 768.27a, the evidence must also be admissible pursuant to MRE 403. *People v Pattison*, 276 Mich App 613, 621; 741 NW2d 558 (2007). MRE 403 states, in pertinent part, "although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . ." MRE 403 does not prohibit the use of highly prejudicial evidence, but excludes unfairly prejudicial evidence. *Taylor v Mobley*, 279 Mich App 309, 315; 760 NW2d 234 (2008). "Unfair prejudice exists where there is danger that the evidence will be given undue or preemptive weight by the trier of fact, or when it would be inequitable to allow the use of such evidence." *Id.* Even though the evidence was prejudicial, the witnesses' testimony regarding this incident was highly probative to demonstrate defendant's continuing course of conduct with the victim, and it increased the likelihood he committed these charged offenses and bolstered the victim's credibility. Its probative value was not outweighed by the danger of unfair prejudice. Additionally, defendant's claim that the evidence was barred because it was propensity evidence is meritless. MCL 768.27a specifically states evidence admitted pursuant to this statute may be used in any relevant manner. Any manner includes demonstrating propensity. *Pattison, supra* at 621 ("MCL 768.27a now allows the admission of other-acts evidence to demonstrate the likelihood of a defendant's criminal sexual behavior toward other minors.").

Defendant further argues the evidence was inadmissible because the prosecution failed to provide notice as required by the statute. MCL 768.27a requires the prosecution to "disclose the evidence to the defendant at least 15 days before the scheduled date of trial or at a later time as allowed by the court for good cause shown, including the statements of witnesses or a summary of the substance of any testimony that is expected to be offered." Defendant fails to provide any supporting authority within the body of his argument to support that the lack of notice affected the admissibility of the evidence. Defendant has abandoned this claim. *People v Albert Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998) ("An appellant may not merely announce a position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment with little or no citation of supporting authority."). However, even when considered, defendant cannot prevail on this claim. Defendant failed to prove that the outcome of the trial would have been different had the prosecution provided the required notice. See *People v Hawkins*, 245 Mich App 439, 453-457; 628 NW2d 105 (2001). The evidence was admissible despite the lack of notice. *Id.* For the same reasons, the trial court was not ineffective for failing to object to the admission of this evidence. *People v Brown*, 279 Mich App 116, 142; 755 NW2d 664 (2008) ("It is well established that defense counsel is not ineffective for failing to pursue a futile motion.").

Defendant's argument that he was denied a fair trial because the evidence of the Washington State incident was barred as propensity evidence by MRE 404(b) also fails. Because the evidence was admissible under MCL 768.27a, a discussion of whether the evidence was barred by MRE 404(b) is unwarranted. *Pattison, supra* at 618-619.

Defendant finally contends that he is entitled to resentencing. We disagree. First, defendant argues that certain sentencing variables were misscored. Because the sexual abuse in the present case occurred between 1991 and 1997 before the legislative sentencing guidelines were enacted, defendant was sentenced pursuant to the judicial sentencing guidelines. *People v Reynolds*, 240 Mich App 250, 253; 611 NW2d 316 (2000), ("[T]he legislative guidelines apply only to offenses committed on or after January 1, 1999."); MCL 769.34(2). This Court reviews a trial court's judicial sentencing decisions for an abuse of discretion. *People v Compagnari*, 233 Mich App 233, 236; 590 NW2d 302 (1998). It is uncontested that defendant was an habitual offender, fourth offense, MCL 769.12. "[T]he [judicial] sentencing guidelines do not apply to habitual offender sentences." *People v Edgett*, 220 Mich App 686, 691; 560 NW2d 360 (1996). "[A] defendant sentenced as an habitual offender may not challenge on appeal the trial court's calculation of the guidelines for the underlying offense." *Id*. at 695. Thus, the scoring of the offense variables was irrelevant to the sentence imposed by the trial court and any error constituted harmless error. *Id.* at 691.

Defendant further alleges that his sentence violates the United States Supreme Court decision, *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004). This argument is meritless where defendant was not sentenced above the legislatively authorized range of punishment for the crime and where our Supreme Court has ruled that *Blakely* does not affect Michigan's sentencing scheme. *People v Drohan*, 475 Mich 140, 160; 715 NW2d 778

(2006).

Affirmed.

/s/ Jane M. Beckering
/s/ Kurtis T. Wilder
/s/ Alton T. Davis